

MOTION FILED

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-1172

**THE FIRST NATIONAL BANK OF BOSTON, NEW ENGLAND
MERCHANTS NATIONAL BANK, THE GILLETTE COM-
PANY, DIGITAL EQUIPMENT CORPORATION, and
WYMAN-GORDON COMPANY, Appellants,**

v.

**FRANCIS X. BELLOTTI, ATTORNEY GENERAL, and COALI-
TION FOR TAX REFORM, INC., and UNITED PEOPLES,
INC., Appellees.**

**On Appeal from the Supreme Judicial Court
for the Commonwealth of Massachusetts**

**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS
CURIAE AND BRIEF OF AMICUS CURIAE PACIFIC
LEGAL FOUNDATION IN SUPPORT OF APPELLANTS**

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**MOTION OF PACIFIC LEGAL FOUNDATION FOR
LEAVE TO FILE BRIEF AS AMICUS CURIAE
IN SUPPORT OF APPELLANTS**

Pursuant to this Court's Rule 42, Pacific Legal
Foundation hereby respectfully moves the Court for
leave to file its brief *amicus curiae* bound with this
Motion.

Pacific Legal Foundation has the consent of counsel
for appellants, but has been unable to receive consent

from counsel for appellees. Letters from appellants and appellees have been filed with the Clerk.

The accompanying brief urges this Court to reverse the decision of the Supreme Judicial Court for the Commonwealth of Massachusetts in *The First National Bank of Boston, et al v. Bellotti, et al.*, 359 N.E.2d 1262 (1977), which held the provisions of Massachusetts General Laws (G.L.) c.55 § 8 Constitutional.

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for the Pacific Legal Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

The Pacific Legal Foundation, due to its unique public interest perspective, believes that it can provide this Court with a more complete argument of the public interests at stake in this litigation.

Pacific Legal Foundation believes that the Supreme Court of Massachusetts erred in upholding the constitutionality of G.L. c.55 § 8 because the statute is constitutionally invalid as a denial of freedom of speech protected by the First Amendment. If the decision is allowed to stand, the statute will have a chilling effect on the exercise of freedom of speech by appellants and parties similarly situated and a direct detrimental effect on the functioning of business corporations.

Many of PLF's supporters and contributors are directly affected by the subject matter of this litigation and are concerned about the implications that such an infringement on free speech by a state legislature will have on the quality of public debate necessary to the electoral process. Secondly, as consumers they have a substantial interest in the ultimate impact such legislation will have on the economic well-being of American business corporations.

PLF strongly urges that the issues this case raises be considered on the merits. The case is not moot. It is typical of those cases which this Court has characterized as "capable of repetition, yet evading review". *Southern Pacific Terminal v. ICC*, 219 U.S. § 498 (1911). Furthermore, we believe that the issues in this case involve an infringement on fundamental rights protected by the Constitution and that there is a great public interest in the clarification of the constitutional questions presented.

For the foregoing reasons, Pacific Legal Foundation respectfully requests permission to participate as an *amicus curiae* and to file the attached brief supporting appellants.

Respectfully submitted,

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**BRIEF OF AMICUS CURIAE PACIFIC LEGAL
 FOUNDATION IN SUPPORT OF PETITIONERS**

INTEREST OF AMICUS

The interest of the *amicus curiae* is set out in the preceding Motion to file this brief.

OPINIONS BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at 359 N.E.2d 1262 (1977).

INTRODUCTION

The Amicus adopts the Statement of the Case as set forth in Appellants' Jurisdictional Statement.

In order to place the argument of *amicus* against a finding of mootness in proper perspective, a brief description of those interests which Pacific Legal Foundation has identified as involved in this case follows.

The Massachusetts statute here challenged will have a continued chilling effect on the political expression of appellants and has not been mooted by the passing of the November 2, 1976 election. That election marked the fourth time that the Graduated Income Tax (GIT) referendum in issue had been placed before the voters of Massachusetts and there is no guarantee that it will not reappear in subsequent elections. Fundamental rights of freedom of political expression will continue to be impaired by the decision of the Supreme Judicial Court of Massachusetts upholding the constitutionality of this statute.

Pacific Legal Foundation recognizes that the effect of the statute is not limited to restricting the rights of appellants but moreover, will be felt by the general public. By restricting the political expression of business corporations, which constitute an important sector of the community, the people of Massachusetts will be deprived of a full debate on issues of public interest and their constitutionally recognized right to receive information will be violated.

ARGUMENT

I.

Under The Traditional Standards Of Law, This Case Is Not Moot

The doctrine of mootness is based upon the requirement of Article III § 2 of the United States Constitution, which precludes judicial review of abstract questions and contrived disputes. *Liner v. Jafco, Inc.*, 37 U.S. 301 (1964). The Court has defined a case or controversy as one which:

[M]ust be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical statement of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937).

The mootness doctrine merely requires that this case or controversy requirement be met at each stage of judicial review. *U.S. v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

However, the right to present a case or controversy cannot be defeated artificially by focussing on short-term activity while ignoring the long-term, recurring nature of the abuse. *Roe v. Wade*, 410 U.S. 113 (1973). This Court has consistently thwarted attempts to use strategically timed mootness arguments to avoid judicial scrutiny of important issues. *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Carroll v. President & Commissioners*, 393 U.S. 175 (1968).

In *Southern Pacific Terminal Company v. Interstate Commerce Commission*, 219 U.S. 498 (1911), the

Interstate Commerce Commission (ICC) issued an order prohibiting Southern Pacific for a period of two years from giving a rate advantage to preferred customers. The ICC order expired before the case reached this Court. In noting the continuing nature of the controversy, this Court stated,

The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their considerations ought not to be, as they might be, defeated by *short-term orders, capable of repetition, yet evading review*, and at one time the Government and at another time the carriers, have their right determined by the Commission without a chance of redress. (Emphasis added.) 219 U.S. at 515.

This "capable of repetition, yet evading review" standard for establishing a continuing case or controversy has been summarized as having two elements: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (*per curiam*).

Below is Chart A listing the indicia of the Article III case or controversy requirements present in this case. This chart displays the factors in the present case which support the continuing nature of the controversy.

INDICIA OF CASE OR CONTROVERSY

CHART A

Challenged Action Was In Its Duration Too Short To Be Fully Litigated

- | | |
|--|---|
| 1. Only 18-months between legislative action and referendum. | 3. Even stipulated facts did not sufficiently expedite this case. |
| 2. 43-56 month average delay in Massachusetts courts. | |

Reasonable Expectations That The Same Complaining Parties Would Be Subject To Action Again

- | | |
|---|---|
| 1. Massachusetts statute is in full effect. | 6. Attorney General will prosecute plaintiffs if views on GIT are made known. |
| 2. Massachusetts Supreme Court has upheld statute. | |
| 3. GIT referendum has been on ballot four times. | 7. GIT will materially affect corporate assets. |
| 4. GIT Bill is presently before legislature. | 8. Plaintiffs desire to make views on GIT widely known. |
| 5. Four plaintiffs opposed GIT in 1972; all five opposed GIT in 1976. | 9. Attorney General will not change position. |

When presented in summary fashion, it is obvious that the Massachusetts statute will have a continuing broad chilling effect on the right of the plaintiffs to speak out on issues of public importance. Nor is this chilling effect limited to the plaintiffs. The statute provides that ". . . no business corporation incorporated under the laws of or doing business in the Commonwealth and no officer or agent acting in behalf of any corporation . . . shall directly or indirectly . . . [expend funds] . . . influencing or affecting the vote on any

question submitted to the voters . . ." Mass. Gen. Laws c.55 § 8. (Emphasis added.)

The very breadth of the statute makes mootness impossible. The right of both national and local corporate businesses to inform the Massachusetts public of their perspective on important issues is jeopardized by this ill-conceived attempt to isolate the business sector of the American system from the political process. In addition, the right of Massachusetts voters to hear diverse opinions on an issue so that they can be fully informed before casting their ballots shall be severely hampered.

II.

The Mootness Doctrine Should Be Narrowly Applied In Cases Involving Fundamental Freedoms

The first amendment affords the broadest protection to the discussion of public issues:

The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. *Roth v. U.S.*, 354 U.S. 476, 484 (1957).

Where there is regulation of the content of speech, there is a "... need for absolute neutrality by the government; its regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator," *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 67 (1976).

When applied in the area of free expression, the mootness doctrine is particularly inappropriate. Free speech limitations, such as those imposed by the Massachusetts statute, not only curtail the rights of the plaintiffs who wish to be heard but also limit the public's

right to receive information; a right which has been accorded the strongest legal protection. "[Freedom of speech and the press] embraces the right to distribute literature . . and necessarily protects the right to receive it." *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943). Its importance is such that, at times, courts have subordinated the more limited First Amendment rights of certain other parties to the public's right to be informed; e.g., *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 101-02 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases. . . . If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976). (Footnotes omitted.)

When the right of political speech is affected, the mootness doctrine has been narrowly construed. In election cases, where speech is paramount, this court has limited the application of the mootness doctrine.

In *Storer v. Brown*, 415 U.S. 724, 737, n.8 (1974), the impact of past elections was discussed.

The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a

case where the controversy is "capable of repetition, yet evading review." [Citations omitted.] The "capable of repetition, yet evading review" doctrine, in the context of election cases, is appropriate when there are "as applied" challenges as well as in the more typical case involving only facial attacks. The construction of the statute, an understanding of its operation and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.

Although the referendum on the Graduated Income Tax is over, the statute lives on, chilling the speech of all corporations believed to be within the ambit of the Massachusetts statute. This limitation of free expression extends to all corporations "doing business" in Massachusetts. To allow a strained interpretation of the mootness doctrine to terminate judicial review of this frontal assault on freedom of expression will have a nationwide impact and serve to isolate the business sector of the American economy from the public.

CONCLUSION

For the reasons stated above, Pacific Legal Foundation urges the Court to reach the merits of this case.

Respectfully submitted,

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